

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA ex rel.)	
W.A. DREW EDMUNDSON, in his capacity as)	
ATTORNEY GENERAL OF THE STATE OF)	
OKLAHOMA and OKLAHOMA SECRETARY)	
OF THE ENVIRONMENTAL C. MILES TOLBERT,)	
in his capacity AS TRUSTEE FOR NATURAL)	
RESOURCES FOR THE STATE OF OKLAHOMA)	
)	
Plaintiff,)	
)	
)	
)	05-CV-329 GKF (SAJ)
)	
TYSON FOODS, INC., TYSON POULTRY, INC.,)	
TYSON CHICKEN, INC., COBB-VANTRESS, INC.,)	
AVIAGEN, INC., CAL-MAINE FOODS, INC.,)	
CAL-MAINE FARMS, INC., CARGILL, INC.,)	
CARGILL TURKEY PRODUCTION, LLC,)	
GEORGE'S, INC., GEORGE'S FARMS, INC.,)	
PETERSON FARMS, INC., SIMMONS FOODS, INC.,)	
and WILLOW BROOK FOODS, INC.)	
)	
)	
Defendants,)	
)	
)	

THE STATE OF ARKANSAS' AMICUS BRIEF

COMES NOW the State of Arkansas ("Arkansas"), by and through Dustin McDaniel, Attorney General, and for its Amicus Brief states as follows:

I. INTRODUCTION

Late last year, almost three (3) years after filing this lawsuit, the State of Oklahoma ("Oklahoma") filed a motion for a preliminary injunction. In its motion, Oklahoma contends, pursuant to the Resource Conservation and Recovery Act ("RCRA"), specifically 42 U.S.C. § 6903(27) of RCRA, that poultry litter is a "solid waste" that has been "discarded" in the Arkansas portion of the Illinois River watershed.

According to Oklahoma, the decades-long practice of Arkansans using poultry litter as a natural, organic fertilizer has suddenly resulted in an imminent and substantial endangerment and now constitutes a public health hazard so serious, and so widespread, that this Court must issue an injunction preventing the use of poultry litter as a fertilizer by Arkansas citizens in the entire Arkansas portion of the Illinois River watershed.

Arkansas has great interest in Oklahoma's request for an injunction for two reasons. First, federal and Arkansas law does not support Oklahoma's request. Second, having this Court grant Oklahoma's motion would effectively nullify Arkansas' regulating the use of poultry litter as fertilizer; will require this Court to enjoin poultry growers, cattle producers and other farmers and individuals who are not parties in this case; and the magnitude of Oklahoma's request will require this Court to take on the role of a *de facto* administrator of poultry litter in Arkansas, a role Arkansas believes this Court, and indeed any Court, is ill-equipped to assume. In short, if Oklahoma's request for injunction is granted, Arkansans will be restrained from carrying on an activity that is currently legal under federal and Arkansas law. This Court should deny Oklahoma's motion.

II. LEGAL AND FACTUAL ANALYSIS

A. RCRA's Statutory Scheme

According to the United States Supreme Court, "RCRA is a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous wastes." *Merhig v. KFC-Western, Inc.*, 516 U.S. 479, 483, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996). Prior to the enactment of RCRA, solid waste management was a local function. H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. 9 (1976). RCRA attempted to establish a cooperative arrangement among federal, state and local

government with the assignment of specific responsibilities for each level of government.
42 U.S.C. § 6941.

In order to encourage states to develop uniform solid waste management plans, Congress initially provided federal funds for the development of those plans and for the implementation of the plans and programs to provide solid waste management, resource recovery and resource conservation services. The state solid waste management plans were to include:

- the identification of the planning responsibilities of the state, local and regional authorities and the allocation of funds between the participants;
- the prohibition of new open dumps;
- the inventory of all open dumps, the closure of such open dumps and/or the upgrading of open dumps to meet federal guidelines for sanitary landfill criteria;
- **requirements that *all* solid waste must be disposed of in a sanitary landfill or by resource conservation or recovery**

42 U.S.C. § 6943. (Emphasis added). Superimposed on the planning process was also the parallel requirement that a state have authority to implement the regulatory requirements of the state approved plan, 42 U.S.C. § 6943, and the assurance that landfilled waste would be disposed of in a landfill meeting the federal criteria for a sanitary landfill. 42 U.S.C. §§ 6943(a), 6944, 6949a. *See also* 40 C.F.R. pt. 257 (criteria for classification of solid waste disposal facilities and practices). Pursuant to this comprehensive federal scheme, Arkansas applied for, and received, federal financial assistance for development of its state Solid Waste Management Plan. Arkansas submitted its Solid Waste Management Plan to the United States Environmental Protection Agency for formal approval, and on April 7, 1982, EPA approved Arkansas'

plan. 44 Fed. Reg. 14910 (April 7, 1982); Exhibit 1. In its announcement approving Arkansas' Solid Waste Management Plan, EPA stated:

Approval of the Arkansas plan indicates that the plan meets the requirements set forth in the RCRA, which provides for the identification of State, local and regional responsibilities for solid waste management; and encouragement of resource conservation and recovery; and the development and *application of State controls to provide for environmentally sound waste disposal practices*. 44 Fed. Reg. 14910 (April 7, 1982); Exhibit A. (Emphasis added)

In its amended complaint, Document 18-1, Oklahoma contends that the improper disposal of poultry litter has been “long known” to the poultry defendants. But if the poultry companies have “long known” about the improper disposal of poultry litter, there should be no dispute that EPA has also “long known” about the use of poultry litter in Arkansas too. Despite this knowledge, EPA determined that the Arkansas' Solid Waste Management Plan, which allowed the land application of poultry litter in Arkansas, met “the requirements of 40 CFR 256 developed pursuant to RCRA.”¹ 44 Fed. Reg. 14910; Exhibit 1. The reason EPA approved of Arkansas' Solid Waste Management Plan in the face of allegedly widespread illegal “disposal” of poultry litter is simple – when poultry litter is used as a fertilizer, it is not a RCRA solid waste that has been discarded. If it were, it stands to reason that the EPA would not have approved Arkansas' Solid Waste Plan. Furthermore, case law interpreting RCRA does not support Oklahoma's assertions.

¹ Arkansas' Solid Waste Management Plan was noticed for review and comment in the Federal Register at 46 FR 54772. According to EPA, “no substantive comments,” were received by EPA regarding the plan as of December 4, 1981. Apparently in 1981, even Oklahoma did not believe that Arkansans using poultry litter as a fertilizer was a violation of RCRA.

B. The Use Of Poultry Litter As A Fertilizer Does Not Meet RCRA's Definitions Of "Solid Waste" or "Discarded"

A total of fourteen lines of Oklahoma's brief in support of its motion are dedicated to convincing this Court that poultry litter is a "solid waste" that has been "discarded" in Arkansas' portion of the Illinois River watershed. See "State of Oklahoma's Motion for Preliminary Injunction and Integrated Brief In Support Thereof" Dkt. No. 1373, at 12-13 (filed Nov. 11, 2007). Oklahoma cites this Court to two cases, *United States v. ILCO, Inc.*, 996 F.2d 1126 (11th Cir. 1993) and *Safe Air for Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004) to support its claim that poultry litter is a RCRA solid waste. However, a careful reading of both of these decisions will reveal that neither case supports the contention that the use of poultry litter as a fertilizer is governed by RCRA.

Oklahoma is correct that the *ILCO* case analyzed whether spent lead-acid batteries disposed of by consumers, and then reclaimed by a recycling company, was a solid waste under RCRA. But *ILCO* is unpersuasive in this case because, pursuant to its authority, EPA had promulgated regulations which specifically applied to the reclamation of spent lead-acid batteries. The Court of Appeals for the Eleventh Circuit applied those EPA regulations to the facts in *ILCO* and determined that:

The regulations reflect EPA's policy decision that spent batteries, including their lead components, became "part of the waste disposal problem," *AMC I*, 824 F.2d at 1186, when the original consumer discarded the battery. *ILCO*, 996 F.2d at 1131, 1132.

In a footnote, the Eleventh Circuit went on to explain:

The EPA has interpreted [the components of spent lead-acid batteries] as solid waste under these regulations for five years. See 57 Fed. Reg. 960-61 (Jan 9, 1992). * * * The agency's interpretation of its own regulation in this instance is entitled to substantial deference.

There is no parallel EPA regulation for this Court to apply to poultry litter. If there were, Oklahoma would have cited the Court to that regulation.

Oklahoma's citation to *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, (9th Cir. 2004), *cert. denied*, 544 U.S. 1018, 125 S.Ct. 1973, 161 L.Ed.2d 856 (2005) is puzzling. In *Safe Air* the Ninth Circuit faced the question of whether burnt grass residue remaining after a Kentucky bluegrass harvest and used to fertilize a farm field was a RCRA solid waste and the related question of whether the grass residue had been "discarded" during the grass harvest. *Id.* Unlike in the facts in *ILCO*, the EPA had not promulgated a regulation stating that burnt grass residue was a RCRA solid waste. Consequently, the Ninth Circuit applied three factors gleaned from reviewing other case law interpreting RCRA's solid waste definitions in order to determine when a substance is "discarded," and thus, a "solid waste" for purposes of the RCRA statute. *Id.* at 1043. According to the Ninth Circuit, the RCRA three-step solid waste test requires an examination of whether:

- 1) the material at issue is 'destined for beneficial reuse or recycling in a continuous process by the generating industry itself,'
- 2) whether the material is being actively reused, or whether the material merely has the *potential* of being reused,
- 3) whether the material is being reused by its original owner, as opposed to use by a salvager or reclaimer

Id. at 1043, (emphasis in original). Applying these factors, the Ninth Circuit held that under the ordinary meaning of the term "discard," Kentucky bluegrass residue burnt by farmers and left in bluegrass farm fields to fertilize those fields was not "discarded," and thus not within the RCRA statutory definition of "solid waste." *Id.* at 1047.

Answering “yes” to **any** of the three questions listed above excludes the material at issue from the definition of a RCRA solid waste. Answering these questions in this case results in a “yes” to **all** three. It is undisputed that poultry litter has a beneficial use; that poultry litter is actively used as a natural organic fertilizer; and that in some instances when it is not sold or traded, is also used as a fertilizer by its original owner, the individual poultry growers. The material in question here simply does not meet the requisite definition and, therefore, does not trigger application of RCRA.

Perhaps most compelling on this issue is the Legislative history surrounding the passage of RCRA. In a nutshell, the Legislative history of RCRA unequivocally demonstrates that use of poultry litter as a fertilizer is not a material that Congress intended to regulate under RCRA. The RCRA House Report indicates that Congress was concerned with waste products of all types that were contributing to diminishing landfill capacity, and the parallel need for increased landfill space. According to the Committee:

The words solid waste are laden with false connotations. They are more narrow in meaning than the Committee’s concern. The words discarded materials more accurately reflect the Committee’s interest. H.R.Rep. No. 94-1491, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238-39.

The same House Report stated, “[m]uch industrial and agricultural waste is reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem the committee addresses . . . *Agricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation.*” *Id.* at 3, *reprinted in* 1976 U.S.C.C.A.N. at 6239-41 (emphasis added). Like its analysis of RCRA, the Ninth Circuit reviewed this Legislative history when it decided *Safe Air* and plainly held that “[i]n enacting RCRA, Congress also declared that

agricultural products that could be recycled or reused as fertilizers were not its concern.”

Safe Air at 1045.

The foregoing language could not be clearer and more relevant to the case at hand. It is dispositive and it requires that Oklahoma’s motion be denied.

C. Arkansas’ Solid Waste Program

As stated above, the Arkansas General Assembly has established a comprehensive statutory scheme for regulating solid waste disposal based upon a legislative determination that the collection and disposal of solid waste must be accomplished in a manner that will protect public health, prevent water and air pollution, prevent the spread of disease and the creation of nuisances, and conserve natural resources. Ark. Code Ann. §§ 8-6-202 *et seq.* The collection, transportation, transfer, processing and disposal of solid waste in Arkansas is regulated under the provisions of the Arkansas Solid Waste Management Act (“ASWMA”) and Arkansas Pollution Control and Ecology Commission (“Commission”) Regulation No. 22. Ark. Code Ann. §§ 8-6-201 *et seq.*

The Commission’s Regulation No. 22 is based on, and has incorporated, Title 40 Code of Federal Regulations (“CFR”) Part 257 and Part 258. CFR Part 257 and Part 258 were promulgated under the solid waste section of RCRA, Subtitle D. After the Commission adopted Regulation No. 22, the United States Environmental Protection Agency formally approved Arkansas’ solid waste management program. 44 Fed. Reg. 14910; Exhibit 1. The ASWMA grants ADEQ the authority to issue permits to all solid waste disposal sites and disposal facilities, and requires all individuals in Arkansas to dispose of solid waste at a site or facility permitted by the ADEQ. Ark. Code Ann. § 8-6-205. ADEQ applies RCRA definitions, and definitions arising under CFR Part 257 and

Part 258, in determining whether a material is a “solid waste.” ADEQ has never regulated poultry litter as a solid waste under RCRA or the ASWMA because it is commonly a commodity in Arkansas that is *used* as a soil amendment. Because it is used, it is not a solid waste. EPA has never required ADEQ to regulate poultry litter as a RCRA solid waste. To the best of Arkansas’ knowledge, not a single state in the Country regulates poultry litter as a RCRA solid waste.

If this Court holds that poultry litter is a RCRA solid waste in Arkansas, it will require Arkansas to amend its existing laws and regulations to ensure that poultry litter be disposed of in a permitted disposal site or at a permitted facility, a result that, both from a regulatory perspective and from a landfill capacity perspective, Arkansas is ill-equipped to comply with. A decision by this Court that the use of poultry litter as a fertilizer is an illegal disposal of a solid waste under RCRA would turn Arkansas’ EPA approved solid waste program on its head.

D. Arkansas’ Nutrient Management Program

Of great import is the fact that Arkansas already has a comprehensive plan in place regulating the application of poultry litter in the Illinois River Watershed. Specifically, in 2003, the Arkansas General Assembly addressed the environmental effects of natural and commercial fertilizers by designating certain geographic areas within the Illinois River Watershed as “nutrient surplus areas” subject to nutrient-management plans designed to protect water quality. *See* Ark. Code Ann. §§ 15-20-901, *et seq.* (Arkansas Poultry Feeding Operations Registration Act); Ark. Code Ann. §§ 15-20-1101, *et seq.* (Arkansas Soil Nutrient Application and Poultry Litter Utilization Act); Ark. Code Ann. §§ 15-20-1114 (governing potential conflicts between land application of

poultry litter and Arkansas water and air pollution control laws). The Arkansas Natural Resources Commission subsequently adopted rules and regulations to implement this legislation. These regulations attempt to balance Arkansas' interest in protecting the Illinois River watershed from the adverse effects of excess nutrients with competing interests in maximizing the use of poultry litter as a fertilizer. These nutrient management regulations are so broad that they also apply to use of non-organic (commercial) fertilizer in the Illinois River watershed. Ark. Code Ann. §§ 15-20-1101, *et seq.*

Arkansas' nutrient management laws and regulations reflect the Arkansas General Assembly's judgment that the use poultry litter as a fertilizer can, and must, be balanced with protecting Arkansas' waters. *See* Ark. Code Ann. § 15-20-902(1), (2) ("It is found by the General Assembly that: (1) Litter provides nutrients that are beneficial to plant growth; (2) The proper utilization of litter allows the addition of nutrients to the soil at a low cost"). The Arkansas Legislature has designated the Illinois River Watershed a "Nutrient surplus area," Ark. Code Ann. §§ 15-20-1104(a)(1). Under this law, it is illegal for any person to use poultry litter as a fertilizer without an approved Poultry Litter Management Plan and a private or commercial application certification. Ark. Code Ann. § 15-20-1108. Every Litter Management Plan must be designed by a Certified Nutrient Planner who is trained by staff at the Arkansas Natural Resources Commission and must pass a written exam to ensure they "have the knowledge, skill, and abilities to properly develop nutrient management plans." Ark. Code Ann. §§ 15-20-1002(4), 15-20-1004, 15-20-1005. Similar to Arkansas' solid waste management program, the EPA is

aware of Arkansas' nutrient management program and to the best of Arkansas' knowledge, has expressed no reservations about it.

Tellingly, Oklahoma has not alleged that the poultry defendants, or anyone else for that matter, are in violation of Arkansas' comprehensive nutrient management program. But, if the Court grants Oklahoma's request and issues an injunction completely prohibiting the use of poultry litter as a fertilizer in Arkansas' portion of the Illinois River watershed, the Court will supplant its judgment on a matter of policy with that of the Arkansas General Assembly and a state regulatory agency.

Stated simply, preliminarily enjoining the land application of poultry litter for the duration of this case will leave the Court as the *de facto* administrator of poultry litter in the watershed during the pendency of this litigation. The Court will have to enjoin poultry growers, cattle producers, other farmers, and any individual who resides within the 500,000 acres of the watershed, none of whom are parties before this Court. The Court will then have to establish rules governing the disposition of poultry litter for the balance of the litigation, and presumably beyond. Under RCRA, that will likely involve the Court mandating that the litter be sent to landfills, as RCRA requires that solid waste be either landfilled or incinerated. 42 U.S.C. §§ 6943(a), 6944, 6949a, *See also*, 40 C.F.R. pt. 257. If the logistics and economics of landfilling and incineration of poultry litter prove daunting, resolution of those issues will be squarely before this Court. These are but a handful of questions that could arise should the Court take on responsibility for the use of poultry litter as fertilizer in the Illinois River watershed in Arkansas. The Court should deny Oklahoma's motion.

III. CONCLUSION

At present, Arkansas has in place regulatory regimes designed to address the use of poultry litter, and even commercial fertilizers, in the Illinois River watershed. As described above, Arkansas' solid waste program meets RCRA standards and is federally approved by EPA. Arkansas' nutrient management program is actively issuing permits to individuals who apply poultry litter to particular properties based on property-specific evaluations of whether that use is appropriate. And RCRA case law and legislative history does not support Oklahoma's claim that poultry litter is a RCRA "solid waste" that has been "discarded" in the Arkansas portion of the Illinois River watershed, or any other part of Arkansas. Arkansas respectfully urges the Court to leave Arkansas' established regulatory schemes in place and deny Oklahoma's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 15th of February 2008, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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EXHIBIT 1

FOCUS - 2 of 2 DOCUMENTS

ENVIRONMENTAL PROTECTION AGENCY

AGENCY: Environmental Protection Agency, Region VI.

40 CFR Part 256

Approval of Arkansas Solid Waste Management Plan

[SW-6-FRL-2086-3]

47 FR 14910

April 7, 1982

ACTION: Notice of approval.

SUMMARY: As provided by the Resource Conservation and Recovery Act (RCRA), the State of Arkansas has received Federal financial assistance for development of a State solid waste management plan. The State of Arkansas has submitted to the U.S. Environmental Protection Agency (EPA or the Agency) its adopted State solid waste management plan. Today, EPA is announcing its approval of the Arkansas Solid Waste Management Plan. Approval of the Arkansas plan indicates that the plan meets the requirements set forth in the RCRA, which provides for the identification of State, local and regional responsibilities for solid waste management; and encouragement of resource conservation and recovery; and the development and application of State controls to provide for environmentally sound solid waste disposal practices.

The purpose of this notice is to inform the public that the Agency is approving the Arkansas Solid Waste Management Plan.

EFFECTIVE DATE: April 7, 1982.

FOR FURTHER INFORMATION CONTACT:

Henry E. Thompson, Jr., U.S. EPA, Hazardous Materials Branch, 1201 Elm Street, Dallas, Texas 75270, 214-767-2645.

TEXT: SUPPLEMENTARY INFORMATION:

Background

On July 31, 1979, (44 FR 45066) EPA published *Guidelines for the Development and Implementation of State Solid Waste Management Plans* (40 CFR Part 256). These guidelines were required by section 4002(b) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA).

47 FR 14910

The guidelines reflected the statutory requirements for State plans and recommended methods and procedures to meet those requirements. Under section 4007 of RCRA, the Administrator approves State plans which meet the requirements of paragraphs (1), (2), (3), and (5) of section 4003 of RCRA and which contain provisions for revisions.

The guidelines also addressed section 4005 of RCRA which requires a mechanism in the State plan for establishment of compliance schedules for entities engaged in the prohibited act of open dumping. These compliance schedules may not extend beyond September 13, 1984. The plan must provide that, in attempting to obtain such compliance schedules, entities must demonstrate their inability to utilize other public or private alternatives to comply with the prohibition.

Response to Public Comments

On November 4, 1981, (46 FR 54772) the Arkansas Solid Waste Management Plan was noticed for review and comment. Comments on the Arkansas plan were received for 30 days. As of December 4, 1981, no substantive comments were received by Region VI regarding the plan.

Finding

Section 4007 of RCRA contains the statutory policy for approval of State solid waste management plans. The authority to approve State plans has been delegated to the Regional Administrator. I have reviewed the solid waste management plan submitted by the State of Arkansas. I find that the Arkansas plan meets the requirements of 40 CFR 256 developed pursuant to RCRA. Under authority of Section 4007 of RCRA, I approve the Arkansas Solid Waste Management Plan.

The plan prohibits the establishment of open dumps, and that State prohibition became effective on January 23, 1981.

Also, the plan provides for compliance schedules for entities engaged in open dumping where those entities can demonstrate that they are unable to utilize other public or private alternatives for solid waste management to comply with the RCRA prohibition of open dumping. As of this date entities engaged in open dumping may, pursuant to the plan, approach the State for further information on compliance schedules and necessary demonstrations. The RCRA prohibition of open dumping does not extend to open dumping under such compliance schedules.

Compliance With Executive Order 12291

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

List of subjects in 40 CFR Part 256

Grant programs -- environmental protection waste treatment and disposal.

Authority: Sec. 4007(a) of the Solid Waste Disposal Act as amended by the Resource Conservation and Recovery Act of 1976, 42 U.S.C. 6947(a).

Dated: February 24, 1982.

Dick Whittington,

47 FR 14910

Regional Administrator.

SUBJECT: Approval of the Arkansas Solid Waste Management Plan, Certification Under the Regulatory Flexibility Act.

I certify under 5 *U.S.C. 605(b)* that the approval of the Arkansas Solid Waste Management Plan will not have a significant economic impact on a substantial number of small entities. Thus approval will reduce burdens on small entities by establishing a mechanism to insulate them from citizen suits to enforce the open dumping prohibition. This rule, therefore, does not require a regulatory flexibility analysis.

Dated: March 31, 1982.

Anne M. Gorsuch,

Administrator.

[FR Doc. 82-9358 Filed 4-6-82; 8:45 am]

BILLING CODE 6560-50-M